

### **Remarks**

In view of the remarks presented herein, favorable reconsideration and allowance are respectfully requested. Claims 1, 14, 26, 31, 37, 53, 55-66, 71 and 73 have been hereby amended. Claims 29 and 76 have been hereby cancelled. Claims 1, 3, 7-18, 21-28, 30-47, 53 and 55-75 are pending for examination.

Claims 71-76 stand rejected under 35 U.S.C. §112. Appropriate corrections have been made to claims 71 and 73 and withdrawal of this rejection is requested.

Claims 14-18, 21-47 and 60-66 are rejected under 35 U.S.C. §101 as being allegedly directed at non-statutory subject matter.

Independent claim 14 recites, *inter alia*, "storing the encoded collected backend server capability data in at least one of a persistent or non-persistent memory included with the collection computer." Thus, claim 14 results in a change of state of the persistent or non-persistent memory of the collection computer from a state where the memory is not storing the encoded collected backend server capability data to a state where such data is being stored. Accordingly, claims 14 and claims 15-18 and 21-25 dependent therefrom now statutorily claim a transformation of state of the underlying subject matter and are proper under 35 U.S.C §101. Withdrawal of the rejection is respectfully requested.

Independent claim 26 recites, *inter alia*, "maintaining a proportional server capability information encoding stored in at least one of a persistent or non-persistent memory in a computer, wherein the maintaining includes at least periodically updating the proportional server capability information stored in at least one of the persistent or non-persistent memory." Thus, claim 26 results in a change of state of the persistent or non-persistent memory of the collection computer from a state where an updated proportional server capability is not stored to one where such an update is stored. Accordingly, claims 26 and claims 27-28 and 30-36 dependent therefrom now statutorily claim a transformation of state of the underlying subject matter and are proper under 35 U.S.C §101. Withdrawal of the rejection is respectfully requested.

Independent claim 37 recites, *inter alia*, "recording data that corresponds to servicing of the transmitted sample requests by each of the servers in at least one of a persistent or non-persistent memory in a recording computer." Thus, claim 37 results in a change of state of the persistent or non-persistent memory of the collection computer from a state where data that corresponds to servicing of the transmitted sample requests by each of the servers is not recorded to one where such data is recorded. Accordingly, claims 37 and claims 38-47 dependent therefrom now statutorily claim a transformation of state of the underlying subject matter and are proper under 35 U.S.C §101. Withdrawal of the rejection is respectfully requested.

According to the Examiner, the claimed computer program product of claims 60-66 is software *per se*. A similar alleged problem exists, although not noted, with respect to claims 53 and 55-59. Claims 53 and 55-66 have been amended to claim a computer-readable

medium encoded with a computer program in accordance with MPEP 2106.01(I).  
Withdrawal of the rejection is requested.

All claims stand rejected under 35 U.S.C. §103(a) as being unpatentable over Kawata et al (U.S. App. Pub. 2002/0032777) in view of Schlangen (U.S. App. Pub. 2005/0091217), alone or in combination with other references. The combination of Kawata and Schlangen, however, is incompatible and renders both systems inoperable for their intended purpose.

If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). MPEP 2143.01(VI).

The Examiner states that Kawata teaches test service packets are sent to servers which are processed and returned providing information to the load balancer to load balance requests from clients which is repeated throughout." Thus, according to the Examiner, in Kawata, sample requests are sent to the servers to determine server capability.

Schlangen expressly states that server capability information is sent from the servers to the client. [0016] Schlangen is directed at a system with a scalable, dynamic number of clients competing for resources. *See generally* Schlangen, *see also* [0033] - [0036]. If each client were to query the server with "sample requests" a large burden could be placed on the servers from all of the sample requests. Server capability would be reduced by the processing of the requests and the overall system would suffer. The responses from the requests would indicate server load and processing time including all the time for processing incoming sample requests.

Further, the result obtained from sending a request to the system of Schlangen would rarely, if ever, be indicative of an accurate processing capability of the server. Schlangen clearly teaches that the access to a server by an incoming request from a client is gained through a lottery system [0033]-[0036]. Accordingly, any particular request could be denied access for a long period of time. Only by sending a massive number of sample requests could an accurate determination of average server response time (indicative of capability) be obtained. Otherwise, waiting requests would return long response times improperly indicating low server capability. Of course, sending enough samples to get a proper sample size to overcome the lottery lock-out could cripple the server in and of itself.

Finally, in a system such as this, constant inaccuracies would abound as to server capability. This would result in inaccuracies in server selection in proportion to actual capability as is required by Schlangen [0025]-[0032]. Requests would not be issued in proportion to true server capability. Thus the systems of both Kawata **and** Schlangen would be rendered inoperable for their intended purpose by the combination.

For at least these reasons, one of skill in the art would not have sought to combine the teachings of Kawata with the teachings of Schlangen. None of the additional are cited in

various combinations with the rejections of the dependent claims cures this deficiency of the Kawata/Schlangen combination. Accordingly, the rejection of all claims is rendered improper.

Based at least on the reasons presented herein, all claims are believed to be in condition for allowance. Reconsideration and allowance is respectfully requested.

The Petition fee of \$130 is being charged to Deposit Account No. 02-3978 via electronic authorization submitted concurrently herewith. The Commissioner is hereby authorized to charge any additional fees or credit any overpayments as a result of the filing of this paper to Deposit Account No. 02-3978.

Respectfully submitted,  
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